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IMPLIED POWERS OF AGENT FOR SALE OF LAND

§ 1. WHAT HERE INCLUDED.—It will be borne in mind that the question here to be considered is not in what form or in what manner authority to sell land may be conferred, e. g., whether it must be by writing or may be by word or act, but whether an authority properly created and unquestionably existing for some purpose will include this one, whether authority unquestionably relating in some form to land confers authority to sell it, and whether an authority clearly authorizing a sale of land confers authority to do some other act relating to it.

So far as form is concerned, it will be recalled that parol authorization ordinarily suffices for a mere broker; usually but not universally written authority is requisite for a binding contract to sell; while authority under seal is usually requisite for the execution of instruments necessarily under seal, as usually in the case of deeds of conveyance of land.

§ 2. ———. AUTHORITY TO SELL RATHER THAN MERELY TO FIND A PURCHASER—MERE BROKER NO AUTHORITY TO MAKE A BINDING CONTRACT.—It is to be noted also that the case here contemplated is that in which the agent is really authorized to *sell* and not merely employed to find a purchaser to whom the principal may sell. The distinction is one of consequence because one employed as a mere real estate broker to "sell" land, even though employed by writing, is usually held to have no power to make a binding contract, but is confined to the finding of a person ready, willing and able to buy from the principal on the terms proposed by him.¹ The cases taking

¹ Carstens v. McReavy, 1 Wash. 359, 25 Pac. 471; McReavy v. Eshelman, 4 Wash. 757, 31 Pac. 35; Armstrong v. Oakley, 23 Wash. 122, 62 Pac. 499 (see also Scully v. Book, 3 Wash. 182, 28 Pac. 556); Donnan v. Adams, 30 Tex. Civ. App. 615, 71 S. W. 580; Dickinson v. Updike (N. J.) 49 Atl. 712; Stengel v. Sergeant, 74 N. J. Eq. 20, 68 Atl. 1106; Scull v. Brinton, 55 N. J. Eq. 489, 37 Atl. 740; O'Reilly v. Keim, 54 N. J. Eq. 418, 34 Atl. 1073; Tyrrell v. O'Connor, 56 N. J. Eq. 448, 41 Atl. 674; Morris v. Ruddy, 20 N. J. Eq. 236; McCullough v. Hitchcock, 71 Conn. 401, 42 Atl. 81; Armstrong v. Lowe,

this view proceed upon the theory that the character of the undertaking of the real estate broker is well known, and presumptively his employment, though by writing, is in his capacity as a negotiator merely and not as an agent to close a contract in writing.²

§ 3. — BUT AUTHORITY TO MAKE A BINDING CONTRACT MAY BE FOUND TO EXIST.—But even if it be conceded that the mere employment of a real estate broker does not confer upon him the power to make a binding contract, it is still true that the language employed or the circumstances of the case may be such as to show that such a power was intended.³ Of course a mere request to "list" property,⁴ a mere request to endeavor to find a purchaser,⁵ mere inquiries as to the possibility of a sale, the mere stating of

76 Cal. 616, 18 Pac. 758; *Grant v. Ede*, 85 Cal. 418, 24 Pac. 890; *Lambert v. Gerner*, 142 Cal. 399, 76 Pac. 53; *Ballou v. Bergvendsen*, 9 N. D. 285, 83 N. W. 10; *Brandrup v. Britten*, 11 N. D. 376, 92 N. W. 453; *Campbell v. Galloway*, 148 Ind. 440, 47 N. E. 818; *Furst v. Tweed*, 93 Ia. 300, 61 N. W. 857; *Balkema v. Searle*, 116 Ia. 374, 89 N. W. 1087; *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. 258; *Simmons v. Krammer*, 88 Va. 411, 13 S. E. 902; *Kramer v. Blair*, 88 Va. 456, 13 S. E. 914; *Chadburn v. Moore*, 61 L. J. Ch. 674, 67 L. T. (N. S.) 257, 41 Wkly. Rep. 39; *Glentworth v. Luther*, 21 Barb. (N. Y.) 145. Contra: Compare cases cited in first note to following section.

² Thus in *McCullough v. Hitchcock*, 71 Conn. 401, 42 Atl. 81; *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. 258, and many other cases, in practically identical language, it is said: "A real estate broker or agent is one who negotiates the sales of real property. His business, generally speaking, is only to find a purchaser who is willing to buy the land upon the terms fixed by the owner. He has no authority to bind his principal by signing a contract of sale. A sale of real estate involves the adjustment of many matters besides fixing the price. The delivery of the possession has to be settled; generally the title has to be examined, and the conveyance with its covenants is to be agreed upon and executed by the owner. All of these things require conferences and time for completion. These are for the determination of the owner, and do not pertain to the duties and are not within the authority of a real estate agent. For these obvious reasons, and others which might be suggested, it is a wise provision of the law which withholds from such agent as we think it does, any implied authority to sign a contract of sale in behalf of his principal."

One of several tenants in common authorized to sell the whole property is not a broker within the meaning of this rule: *Vermont Marble Co. v. Mead*, — Vt. —, 80 Atl. 852.

³ See *Pringle v. Spaulding*, 53 Barb. (N. Y.) 17; *Jackson v. Badger*, 35 Minn. 52, 26 N. W. 908; *Stewart v. Wood*, 63 Mo. 252; *Smith v. Allen*, 86 Mo. 178; *Glass v. Rowe*, 103 Mo. 513, 15 S. W. 340; *Farrell v. Edwards*, 8 S. D. 425, 66 N. W. 812; *Colvin v. Blanchard*, 101 Tex. 232, 106 S. W. 323; *Donnell v. Currie*, — Tex. Civ. App. —, 131 S. W. 88; *Peabody v. Hoard*, 46 Ill. 242; *Haydock v. Stow*, 40 N. Y. 363.

⁴ In *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. 258, a letter from the owner telling the broker to list it for twelve months on certain terms or that he would take so much cash, was held not to suggest an authorization to bind the owner by contract.

See also *Ballou v. Bergvendsen*, 9 N. Dak. 285, 83 N. W. 10; and *Brandrup v. Britten*, 11 N. Dak. 376, 92 N. W. 453 (where the language used was "I hereby grant to [the agent] the sale of the following described property," etc.).

⁵ In *McCullough v. Hitchcock*, 71 Conn. 402, 42 Atl. 81, this language was held insufficient to authorize a sale. "I have a building lot I would like to sell. * * * I do not know the value of said lot, but could you not look at the lot and give me an idea of its value and if possible find a purchaser for same."

terms upon which the owner would be willing to sell,⁶ and the like, will not of themselves constitute an authority to sell. It is, however, entirely clear that the correspondence or negotiations between the parties may be such as to create the authority to make a binding contract to sell.⁷ It is not necessary that any particular phraseology

⁶ In *Watkins Land Mortgage Co. v. Campbell*, 100 Tex. 542, 101 S. W. 1078, real estate brokers submitted to their principal an offer they had received for his property and said: "Shall we close the deal?" The principal replied that if the brokers could get the cash payment increased "we would be willing to accept the offer. * * * Awaiting your further report we are, etc." Held, not to authorize the making of a binding contract. So in *Simmons v. Kramer*, 88 Va. 411, 13 S. E. 902, the broker wrote to his principal reporting an offer; the principal replied that he would not accept the offer but stated the price and terms at which he would be willing to sell concluding thus: "Will give you 2% commission awaiting a reply." Held, not to be sufficient to justify the making of a contract.

See also *Lambert v. Gerner*, 142 Cal. 399, 76 Pac. 53; *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499 (where a letter of the owner was held to merely express the terms upon which the owner would be willing to enter into a contract with a purchaser); *Kramer v. Blair*, 88 Va. 456, 13 S. E. 914; *Campbell v. Galloway*, 148 Ind. 440, 47 N. E. 818.

An attorney wrote asking the defendant if he would accept \$350 for certain piece of property. Defendant telegraphed that he would take \$450, whereupon the attorney sold the property for \$500 and converted it to his own use. On suit by purchaser for specific performance it was held that the correspondence did not amount to an authorization to sell. *Prentiss v. Nelson*, 69 Minn. 496, 72 N. W. 831.

In answer to a letter inquiring at what price the defendant would sell, written by real estate brokers, the defendant replied, "\$4200 on time * * * or \$4100 cash is the lowest price I will take." Brokers sold on terms given and it was held that the sale was unwarranted, the correspondence having amounted only to an offer. *Jahn v. Kelly*, 58 Ill. App. 570.

In *Donnan v. Adams*, 30 Tex. Civ. App. 615, 71 S. W. 580, it was held that a memorandum containing description and price executed and signed by the owner and accompanied by oral instruction to sell did not constitute an authority in the agent to make a contract binding the principal.

In *Sullivan v. Leer*, 2 Colo. App. 141 it was held that following correspondence under the circumstances did not constitute a power to sell. March 30, 1889, defendant wrote the agent "I will be in Denver last of April—wish you would have a purchaser, think I ought to get \$17000 for the house." April 20th agent telegraphed: "Lot sold for \$16,000 cash." Owner replied April 24th: "Won't sell for less than \$17,000—be there May 1st." On May 3rd, the day of the defendant's arrival in Denver, the agent telegraphed: "Sold property, \$17,000."

⁷ In *Jackson v. Badger*, 35 Minn. 52, 26 N. W. 908, a letter reading, "You may sell my 40 acres, \$2,000 hand money, and the balance in three years with interest," was held to authorize a binding contract though not sufficient to authorize a conveyance.

In *Stewart v. Wood*, 63 Mo. 252, it was held that this language in a letter conferred power to make a binding contract: "Sell my farm for me at ten dollars per acre, or as much more as you can get."

In *Smith v. Allen*, 86 Mo. 178, the defendant residing in Chicago, wrote to W, a real estate agent in Kansas City, in response to an inquiry about the selling of defendant's property in Kansas City, in the following terms: "I am sick and not able to write; * * * I will leave the sale of the lots pretty much with you; if the party or anyone is willing to pay. * * * I think I am willing to have you make out a deed and I will perfect it. * * * If you think I better try the spring market, hold till then." W showed this letter to the plaintiffs, executed a contract of sale and received earnest money. W then wrote defendant that he had sold on the terms submitted, "subject to your approval." And in subsequent correspondence, it appeared that W through misapprehension or equivocation, led his principal, the defendant, to believe he had not made a binding

be used, or that the authorization be in any formal terms. The question is, does the language used sufficiently indicate that the party is authorized to close a binding contract of sale? This may be merely a question of the construction of the words used, or it may be an inference of fact as to intention to be decided like other similar questions. Naturally enough as in other similar cases different courts may draw different inferences from substantially similar facts, and many instances are to be found of apparently irreconcilable conclusions although the courts purported to apply the same principles. It is not to be denied, however, that there are some cases in which the courts have proceeded upon wholly irreconcilable theories and of course have reached conflicting results.⁸ Thus in a few cases express authority to sell even though all the terms

contract. It was held that the defendant's letter was a sufficient authorization to the agent to bind his principal and that the letters thereafter did not explain the meaning of the authority but indicated merely the opinions of the writers, as to the consequences of their act.

In *Glass v. Rowe*, 103 Mo. 515, 15 S. W. 334, a letter in these words was held to confer a power to bind the principal by contract—the letter was from a non-resident owner to a local real estate agent: "Will now sell \$350 per foot. A regular commission of two and a half per cent to you after sale is made and closed. Terms, * * *."

In *Farrell v. Edwards*, 8 S. D. 425, 66 N. W. 812, there was a series of communications between the owner and a real estate dealer resulting in a sale by contract made by the agent. It was held that the authority was contained in two letters, the substantial portions of which are as follows: "If you find a buyer, you can fix up the papers at any of the banks. I want 300 down, and my share of the crop; balance, 900, at 8 per cent," and "if you make the deal, you better write me before making out the papers to send to me to sign." The court also relied upon a ratification.

In *Colvin v. Blanchard*, 101 Tex. 231, 106 S. W. 323, the principal wrote to a firm of real estate dealers in whose hands the property had been placed for sale: "I will sell the lots for \$19,000 and pay you a 5 per cent com. plus \$50, or \$1,000 com. in all for making the sale. * * * Terms, \$3,000 cash, bal. long time." The agents in pursuance of this letter made a contract. It was held that the letter conferred a power to contract. There was evidence of subsequent assent on part of the seller but as matter of ratification it was not noted by the courts.

See also *Donnell v. Currie*, — Tex. Civ. App. —, 131 S. W. 88.

⁸ Thus for example an undoubted majority of the courts generally following the case of *Duffy v. Hobson*, 40 Cal. 240, 6 Am. Rep. 617, have put such a construction upon the employment of the ordinary real estate broker as to exclude his authority to make a binding contract unless there be something in the case to alter the ordinary presumption. (See also *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. 758; *Grant v. Ede*, 85 Cal. 418, 24 Pac. 890; *Lambert v. Gerner*, 142 Cal. 399, 76 Pac. 53.)

McCullough v. Hitchcock, 71 Conn. 401, 42 Atl. 81; *Buckingham v. Harris*, 10 Colo. 455, 15 Pac. 817; *Ryon v. McGee*, 2 Mack. (D. C.) 17; *Mannix v. Hildreth*, 2 App. Cas. D. C. 259; *Jones v. Holladay*, 2 App. Cas. D. C. 279; *Balkema v. Searle*, 116 Iowa 374, 89 N. W. 1087; *Campbell v. Galloway*, 148 Ind. 440, 47 N. E. 818; *Milne v. Kleb*, 44 N. J. Eq. 378, 14 Atl. 646; *Lindley v. Keim*, 54 N. J. Eq. 418, 34 Atl. 1073; *Dickinson v. Updike* (N. J. Eq.) 49 Atl. 712; *Scully v. Brinton*, 55 N. J. Eq. 489, 37 Atl. 740; *Tyrrell v. O'Connor*, 56 N. J. Eq. 448, 41 Atl. 674; *Bailou v. Bergvendsen*, 9 N. Dak. 285, 83 N. W. 10; *Donnan v. Adams*, 30 Tex. Civ. App. 615, 71 S. W. 580; *Halsey v. Monteiro*, 92 Va. 581, 24 S. E. 258; *Carstens v. McReavy*, 1 Wash. 359, 25 Pac. 471; *Barnes v. German Sav. Soc.* 21 Wash. 448, 58 Pac. 569; *Armstrong v. Oakley*, 23 Wash. 122, 62 Pac. 499.

were specified has been held to be a mere authority to "sell" as a broker, that is, to find a purchaser but not to close a binding contract with him.⁹

In all cases of this sort in which written authority is requisite to justify a contract of sale, the person dealing with the agent, is, in contemplation of law, charged with knowledge of that fact and deals with the agent's credentials before him.¹⁰ These agents, moreover, are usually special agents, and their authority is to be deemed to be strictly limited to that which is either expressly given or necessarily implied.¹¹

§ 4. MERE PRELIMINARY CORRESPONDENCE OR NEGOTIATION NOT ENOUGH TO CONFER AUTHORITY.—It is obvious also that before the questions here suggested can be determined, the authority intended to be conferred must be completely agreed upon and vested. If, therefore, the dealings between the principal and the agent have not passed beyond the stage of preliminary correspondence, if the terms upon which the authority is to be executed or the property sold are not yet fully determined, if further communications are to be had with the principal or further assent given before the authority is to be exercised,¹² and the like, there can ordinarily be no present authority to sell in such wise as to bind the principal.¹³

⁹ In *Armstrong v. Lowe*, 76 Cal. 616, 18 Pac. 758, the defendant employed a firm of real estate agents to sell property and made and delivered to them this memorandum: "You are hereby authorized to sell my property and to receive deposit on the same, situated * * * for the sum of two hundred dollars per acre, cash. I hereby agree to pay you the sum of five per cent for your services in case you effect a sale or find a purchaser for the same, or will pay you two and one-half per cent of above commission should I sell the same myself or through another agent." **Held**, that this writing did not authorize the making of a binding contract.

On the other hand, in *Haydock v. Stow*, 40 N. Y. 363, a writing in language almost identical was held to confer a power to make a contract. "I hereby authorize and empower Peck, Hellman and Parks, agents for me, to sell the following described property [description and terms]."

See also *Jackson v. Badger*, 35 Minn. 52, 26 N. W. 908.

¹⁰ *Schaeffer v. Mutual Ben. L. Ins. Co.*, 38 Mont. 459, 100 Pac. 225; *Miller v. Wehrman*, 81 Neb. 388, 115 N. W. 1078; *Rawson v. Curtiss*, 19 Ill. 455.

¹¹ *Schaeffer v. Mutual Ben. L. Ins. Co.*, supra; *Moore v. Skyles*, 33 Mont. 135, 82 Pac. 799, 144 Am. St. Rep. 801; 3 L. R. A. (N. S.) 136; *Brown v. Grady*, 16 Wyo. 151, 92 Pac. 622.

¹² As for example, where the principal's approval is to be given before the sale is made: *Burlington, etc., R. Co. v. Sherwood*, 62 Iowa 309, 17 N. W. 564; *Alcorn v. Buschke*, 133 Cal. 655, 66 Pac. 15; *Johnson v. American Freehold L. Mtg. Co.*, 111 Ga. 490, 36 S.E. 614.

In *Furst v. Tweed*, 93 Iowa 300, 61 N. W. 857, the principal wrote saying that he asked a certain sum; that he would sell "on almost any terms to suit purchaser," and "if you succeed in selling, I am willing to allow you" a certain commission. **Held**, that the language used respecting the terms indicated that this matter was to be referred to him, and that the agent had no authority to close a binding contract.

In *Balkema v. Searle*, 116 Iowa 374, 89 N. W. 1087, there was correspondence stating

§ 5. **CONDITIONAL AUTHORITY.**—The authority may, of course, be a qualified or conditional one. As long as the conditions or limitations are lawful, there is no reason why the principal may not limit or qualify the authority to any extent which suits his pleasure. Such limitations or conditions, unless waived, will be operative against the agent and also against third persons who have, or are charged with, notice of them. The authority may thus be limited as to time, price, subject matter, terms, and the like, and many illustrations of such limitations will be found in the following sections. It may also require the principal's approval before a particular execution shall be deemed authorized.¹⁴

terms, part cash, "balance given on time," but the time was not stated. The court said: "In the correspondence, some matters were left indefinite, to be settled by defendant, doubtless, when the purchaser appeared." **Held**, that agent had no authority to make a binding contract.

In *Grant v. Ede*, 85 Cal. 418, 24 Pac. 890, where the owners wrote, "we will sell" at a certain price at any time before a given date, the court said that the agent was not thereby authorized to sell, and in any event material terms were not agreed upon, e. g., the form of deed, the time of payment, and the time of delivery of possession.

¹³ See, for example, *Stewart v. Pickering*, 73 Iowa 652, 35 N. W. 690. In this case the defendants, land brokers in Iowa, wrote to the plaintiff's attorney in fact: "Do you have charge of the lands in this county belonging to the estate of S? If so, are they for sale? * * * If the title is all right, we can possibly find a customer for the list this year. Let us hear from you as to prices, etc." The reply thereto was as follows: "I herewith inclose you a price-list of our lands in your county. My mother is the widow of S, and is the sole devisee by will which is recorded in your county. I am executor of my father, and attorney in fact of my mother. The titles are all strictly clear and good." Attached to this letter was the following: "Western land for sale, Winnebago county, Iowa." [Here followed a list of the land with the prices.] "Apply to D. S., Falls City, Pa., etc Terms ¼ down, balance in 4 equal annual payments, with 5 per cent interest," etc. **Held**, that this correspondence gave no authority to the defendants to bind the owner by a sale at the prices named, but was at most an authority to sell only subject to her approval or that of her attorney in fact.

See also *Stillman v. Fitzgerald*, 37 Minn. 186, 33 N. W. 564, where a firm of real estate brokers wrote to the defendant saying: "We have a customer [meaning the plaintiff] who would buy your lot if offered at a fair price," and asking him to state best price and the terms, for which he would sell, and pay their commission, which was stated. The defendant answered by letter stating price, and, in part only, the terms, for which he would sell, and that he would pay their commission. It was held that the brokers were not thereby constituted the defendant's agents, with a power to bind him by a contract of sale.

A letter written by the owner of land to a real estate agent stating that he had received the agent's letter in regard to a prospective sale, giving the price at which he hoped to sell, asking for full information, and as to when the deed should be made out and requesting that a blank form of deed be sent to him with the name and residence of the purchaser, does not furnish any evidence that the agent had authority to make a binding contract to sell the property; *Smith v. Browne*, 132 N. C. 365, 43 S. E. 915.

An owner wrote in reply to a broker's request for a price that he would take \$1,000, and, if the broker could sell or rent it, the owner would do right by him. The agent made the sale and further correspondence followed which showed that the agent at least did not regard the letter mentioned as constituting a power and it was held that there had been no authorization. *Riley v. Grant*, 16 S. D. 553, 94 N. W. 427.

¹⁴ See *Alcorn v. Buschke*, 133 Cal. 655, 66 Pac. 15.

§ 6. AUTHORITY TO SELL LAND NOT ORDINARILY TO BE INFERRED FROM MERE GENERAL AUTHORITY TO ACT.—Authority to sell real estate must ordinarily be conferred in clear and direct language; for, although there are cases in which it may arise by implication,¹⁵ it is not lightly to be inferred from express power to do other acts or brought within the operation of mere general terms. A power of attorney, therefore, “to act in all my business, in all concerns, as if I were present, and to stand good in law, in all my land and other business,” gives no power to sell land;¹⁶ nor does a power “to ask, demand, recover or receive the maker’s lawful share of a decedent’s estate, giving and granting to his said attorney his sole and full power and authority to take, pursue and follow such legal course for the recovery, receiving and obtaining the same as he himself might or could do were he personally present; and upon the receipt thereof, acquittances and other sufficient discharges for him and in his name to sign, seal and deliver;”¹⁷ nor does a power “to make contracts, to settle outstanding debts and generally to do all things that concern my interest in any way real or personal, whatsoever, giving my said attorney full power to use my name to release others or bind myself, as he may deem proper and expedient;”¹⁸ nor does a power “to attend to the business of the principal generally,” or “to act for him with reference to all his business;”¹⁹ nor does authority to locate and survey land;²⁰ nor does a power to sell “claims” and “effects.”²¹

¹⁵ Comyns, Dig. VII Poier, A 2, declares, “So, if a man expresses the power only by implication, it is well; as, provided that he shall not have power to alien, etc., otherwise than to make a jointure, and leases for 21 years; it is a good power to make a jointure and leases. I Leo. 148.” See also *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600.

Compare *Bosseau v. O’Brien*, 4 Biss. (U. S.) 395.

¹⁶ *Ashley v. Bird*, 1 Mo. 640, 14 Am. Dec. 313.

¹⁷ *Hay v. Mayer*, 8 Watts (Penn.) 203, 34 Am. Dec. 453. A power of attorney “to ask, demand and receive of and from any person or persons all such real and personal estate as I may be entitled to by virtue of my being a son and heir at law of” a named person does not authorize the attorney to sell and convey the principal’s real estate: *Hotchkiss v. Middlekauf*, 96 Va. 649, 32 S. E. 36. See also *Bean v. Bennett*, 35 Tex. Civ. App. 398, 80 S. W. 662.

¹⁸ *Billings v. Morrow*, 7 Cal. 171, 68 Am. Dec. 235. Same power also construed to the same effect in *Hunter v. Sacramento Valley Beet Sugar Co.*, 14 Cent. L. Jour. 352, 11 Fed. 15.

¹⁹ *Coquillard v. French*, 19 Ind. 274. Nor does a power of attorney appointing one “general and special agent to do and transact all manner of business” necessarily confer power upon the agent to sell bonds belonging to his principal. *Hodge v. Combs*, 1 Black (U. S.) 192. Such a power, said the court, “may be construed to confer almost any or no power.”

²⁰ *Moore v. Lockett*, 2 Bibb (Ky.) 67, 4 Am. Dec. 683.

In *Mitchell v. McLaren* (Tex. Civ. App.) 51 S. W. 269, it was held that a power of attorney “to locate any such certificate in my name or sell and assign the same,” did not empower the agent to locate land by the certificate and then to sell the land.

²¹ *DeCordova v. Knowles*, 37 Tex. 19. See also *Berry v. Harnage*, 39 Tex. 638,

§ 7. —. But where A wrote to C "I wish you to manage (my property) as you would with your own. If a good opportunity offers to sell everything I have, I would be glad to sell. It may be parties will come into San Antonio, who will be glad to purchase my gas stock and real estate," it was held that C was thereby authorized to contract for the sale of the real estate, but not to convey it.²² So authority to "use" land to enable the donee of the power to extricate himself from his financial embarrassments, was held to authorize a sale or a mortgage of the land.²³ A power "to do any lawful act for and in my name as if I were present" was held to authorize a sale and conveyance of land.²⁴

§ 8. WHAT MAY BE SOLD.—In order that the agent may lawfully sell any particular parcel of real estate it is essential that that parcel be included within the language of the power either expressly or by clear implication. It is sometimes said that the land must be described in the power with the same certainty which would be required in the conveyance itself; and, though this may perhaps be too strict a rule, it certainly is requisite that the instruments conferring the authority shall show with reasonable certainty not only what lands are to be the subject matter of the power but also what interests or estates therein are to be sold. A number of illustrations, more or less consistent, of the actual holdings of the courts are appended.

A power of attorney authorizing the agent "to bargain, sell, grant, release and convey, and upon such sales, convenient and proper deeds with such covenants as to my said attorney shall seem expedient, in due form of law, as deed or deeds, to make, seal, deliver and acknowledge," although it is silent as to what the agent is to sell and convey, clearly contemplates a sale of lands and is sufficiently

where a power of attorney in the following terms was held sufficient to authorize a sale of real estate: "to ask, demand, sue for, recover and receive all such sum and sums of money, debts, goods, wares, dues, accounts and other demands whatever, which are or may be due, owing, payable, and belonging to me, or detained from me by any manner of ways and means whatever, in whose hands soever the same may be found; giving and granting unto my said attorney, by these presents, my whole and full power, strength and authority, in and about the premises, to have, use, and take all lawful ways and means, in my name and for the purposes aforesaid, upon the receipt of any such debts, dues or issues of money, acquittances or other sufficient discharge, for me, and in my name, to make, seal, execute deeds of conveyance and deliver, and generally all and every act or acts, thing or things, device or devices, in the law whatsoever needful and necessary to be done in and about the premises, for me and in my name to do and execute and perform."

²² Lyon v. Pollock, 99 U. S. 668.

²³ Baker v. Byerly, 40 Minn. 489, 42 N. W. 395.

²⁴ Veatch v. Gilmer (Tex. Civ. App.) 111 S. W. 746.

broad to authorize the agent to sell and convey whatever estate the principal then had.²⁵

So a power of attorney in due form, authorizing the agent "to sell, bargain and convey three certain lots of land in the village of Pentwater belonging to me," but containing no other or further description, is sufficient where the principal had three such lots and only three in that village;²⁶ but an authority "to convey a piece of land in Colebrook belonging to the Bank," there being more than one such piece is too indefinite.²⁷

An authority to sell all the lands which the principal may own, or all which he may own and lying within a certain territory, is good without a more specific description.²⁸ And an authority to sell any or the whole of the principal's "property" and to execute all necessary instruments authorizes the sale of his real estate.²⁹ Where the lands are sufficiently described, the fact that the principal apparently intended to add a more specific description but failed to do so, will not defeat the power.³⁰

§ 9. —. A power of attorney authorizing an agent to sell "the one-half" of a lot of land, without specifying which half, or whether in common or in severalty, empowers him to sell one-half in severalty and to exercise his own discretion as to which half.³¹

²⁵ *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600. When a power of attorney executed by a husband and wife authorizes the agent to convey any and all lands which may come into "his" possession by reason of certain homestead entries, "his" refers to the husband only and land belonging to them jointly or to the wife alone cannot be included. *Finnegan v. Brown*, 90 Minn. 396, 97 N. W. 144. A widow with one of her children executed a writing empowering an agent to "hunt up, develop, establish and dispose of all lands and land claims belonging to the estate of Robert H. Wynne, deceased (her husband) of which we are the lawful heirs:" a sale under such power conveyed the community rights of the widow as well as the inherited interest of the daughter. The general intent evidenced by the instrument was not required to be limited by giving the words "of which we are lawful heirs" their correct meaning, it being common to speak of a widow as an "heir."

²⁶ *Vaughn v. Sheridan*, 50 Mich. 155

²⁷ *Lumbard v. Aldrich*, 8 N. H. 31, 28 Am. Dec. 381.

²⁸ *Munger v. Baldrige*, 41 Kan. 236, 21 Pac. 159, 13 Am. St. Rep. 273; *Roper v. McFadden*, 48 Cal. 346; *Kane v. Sholars*, 41 Tex. Civ. App. 154, 90 S. W. 937.

A power to convey "all of our land in the State of North Carolina" held a sufficient description to admit evidence aliunde to identify. *Janney v. Robbins*, 141 N. C. 400, 53 S. E. 863.

²⁹ *Gardiner v. Griffith* (Tex. Civ. App.) 56 S. W. 558.

A power of attorney to sell and convey "any or all tracts, lots, pieces or parcels of land or real estate which have descended to, or have been acquired by, the said * * * [plaintiff], in any of the States * * * of the United States of America, * * * excluding therefrom all lots in the city of Omaha, State of Nebraska," is sufficient to include lands in Pennsylvania belonging to the principal; *Linton v. Moorhead*, 209 Pa. 646, 59 Atl. 264.

A power to sell and convey all the land of the principal within a certain parish is a sufficient description; *Rownd v. Davidson*, 113 La. 1048, 37 So. 965.

³⁰ *Bradley v. Whitesides*, 55 Minn. 455, 57 N. W. 148.

³¹ *Alemanly v. Daly*, 36 Cal. 90.

Where an agent is authorized to sell all the land of his principal which the latter had not previously conveyed, he may convey what the principal had previously sold but not conveyed;³² and under a general authority to sell any of his principal's real estate he may sell that which the principal subsequently acquires;³³ especially where the power expressly refers to lands which the principal "does or may" own.³⁴ But where the power clearly contemplated the inauguration of a business and authorized the agent to "buy and sell" lands, it was held that the power to sell was to be limited to lands bought under it.³⁵ And, clearly, where the power is limited to land which the principal owns or is interested in at the time of the execution of the power, a conveyance of subsequently acquired land is not authorized.³⁶

§ 10. WHEN AUTHORITY TO BE EXERCISED.—Where a definite time is fixed by the clear language of the power, any sale after that time will be inoperative unless the principal waives the limitation or ratifies the sale.³⁷ An authority to sell lands at a given sum, if they can be sold "immediately," will not authorize a sale at that price a month afterwards, without any further authority;³⁸ nor can an agent empowered to sell real estate at a given price, without further instructions, sell it a considerable time later at the same price when the land has greatly increased in value.³⁹ An authority to an agent to sell real estate within "a short time" will authorize a sale made within two weeks, even though in the meantime the property has enhanced in value.⁴⁰

§ 11. WHAT EXECUTION AUTHORIZED.—An agent authorized to make the purchase price payable "in three years," has no implied authority to make it payable "on or before three years,"⁴¹

³² Mitchell v. Maupin, 3 T. B. Mon. (Ky.) 185.

³³ Fay v. Winchester, 4 Metc. (Mass.) 513. See also Benschoter v. Lalk, 24 Neb. 251, 38 N. W. 746; Benschotter v. Atkins, 25 Neb. 645, 41 N. W. 639.

³⁴ Berkey v. Judd, 22 Minn. 287; Bigelow v. Livingston, 28 Minn. 57, 9 N. W. 31.

³⁵ Greve v. Coffin, 14 Minn. 345, 100 Am. Dec. 229. See also Allis v. Goldsmith, 22 Minn. 123.

³⁶ Turner v. McDonald, 76 Cal. 177, 18 Pac. 262, (even though the land was subsequently acquired by foreclosure of a mortgage which the principal then owned); Penfold v. Warner, 96 Mich. 179, 55 N. W. 680.

³⁷ Henry v. Lane, 128 Fed. 243, 62 C. C. A. 625.

³⁸ Matthews v. Sowle, 12 Neb. 398.

³⁹ (Nine months later), Wasweyler v. Martin, 78 Wis. 59, 46 N. W. 890; (three years later), Proudfoot v. Wightman, 78 Ill. 553. Same where six years had elapsed and the land had changed greatly in value and state of improvement; Hall v. Gambrill, 88 Fed. 709. But compare Hartford v. McGillicuddy, 103 Me. 224, 68 Atl. 860.

⁴⁰ Smith v. Fairchild, 7 Colo. 510.

⁴¹ Jackson v. Badger, 35 Minn. 52, 26 N. W. 908; to the same effect see Dana v. Turlay, 38 Minn. 106, 35 N. W. 860; Jones v. Holladay, 2 App. D. C. 279; Coleman v. Garrigues, 18 Barb. (N. Y.) 60; Henry v. Lane, 128 Fed. 243, 62 C. C. A. 625, and Monson v. Kill, 144 Ill. 248, 33 N. E. 43.

So authority to sell real estate in "lots as surveyed by" a person named, does not empower the agent to sell the whole tract for a gross sum or at so much per acre.⁴² And an authority to sell lands for \$5,000, one-half cash, does not authorize an agreement to sell for \$5,000, \$2,000 cash, \$2,300 in three weeks and the balance on time;⁴³ nor does an authority to sell on time with interest on deferred payments authorize a sale for cash;⁴⁴ neither does an authority to make a sale of lands for a certain amount authorize a sale in which part of the purchase price is to be paid in cash and part on deferred payments, the vendor to furnish an abstract of title and pay taxes and interest thereafter accruing;⁴⁵ so an authority to sell at auction does not authorize a private sale;⁴⁶ nor an authority to sell to one person authorize a sale to an entirely different person.⁴⁷ Further an authority to sell for one price does not authorize a sale for a less amount;⁴⁸ or an authority to sell, the vendee to pay the mortgages does not authorize a sale, the vendee to "assume" the mortgages unless they are not yet due.⁴⁹

§ 12. —. But where an agent is authorized to sell partly for cash and partly on time, a sale with more than one-third cash and the balance in three and five years with 6 per cent. interest, and secured by a mortgage is within the terms of the authority;⁵⁰ or where the authority is to sell, the payments to be made in three equal installments, a clause providing that if the installments are not paid at the time specified the contract shall be forfeited at the option of the seller is within the authority;⁵¹ or when the agent is authorized to convey land including a town site, he may sell a lot and make

⁴² Rice v. Tavernier, 8 Minn. 248, 83 Am. Dec. 778.

⁴³ De Sollar v. Hanscome, 158 U. S. 216, 15 Sup. Ct. 816; to the same effect, see, Speer v. Craig, 16 Colo. 478, 27 Pac. 891, Field v. Small, 17 Colo. 386, 30 Pac. 1034; Rundle v. Cutting, 18 Colo. 337, 32 Pac. 994; Monson v. Kill, 144 Ill. 248, 33 N. E. 43; Staten v. Hammer, 121 Ia. 499, 96 N. W. 964.

⁴⁴ Everman v. Herndon, 71 Miss. 823, 15 So. 135.

⁴⁵ Staten v. Hammer, 121 Ia. 449, 96 N. W. 964; to the same effect, see, Strong v. Rois, 33 Ind. App. 586, 71 N. E. 918. See also Brown v. Grady, 16 Wyo. 151, 92 Pac. 622; Morton v. Morris, 27 Tex. Civ. App. 262, 66 S. W. 94.

⁴⁶ Davis v. Gordon, 87 Va. 559, 13 S. E. 35.

⁴⁷ Breen v. Rives, 16 App. Div. (N. Y.) 632, 44 N. Y. Supp. 672; to the same effect, see Graves v. Horton, 38 Minn. 66, 35 N. W. 568.

⁴⁸ Field v. Small, 17 Colo. 386, 30 Pac. 1034; to the same effect, see, Philadelphia Mortgage and Trust Co. v. Hardesty, 68 Kan. 683, 75 Pac. 1115; Holbrook v. McCarthy, 61 Cal. 216; Bush v. Cole, 28 N. Y. 261, 84 Am. Dec. 343; Wasweyler v. Martin, 78 Wis. 59, 46 N. W. 890. But otherwise, where the agent is given discretion, as where he is told that as soon as he was satisfied that he was getting "the top notch in price" he should "close the deal:." Vermont Marble Co. v. Mead, — Vt. —, 80 Atl. 852.

⁴⁹ Schultz v. Griffin, 121 N. Y. 294, 24 N. E. 480, 18 Am. St. Rep. 825.

⁵⁰ Smith v. Keeler, 151 Ill. 518, 38 N. E. 250.

⁵¹ McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816.

the conveyance by metes and bounds;⁵² also where he is authorized to make "one-half payable on or before one year" a contract to sell for "one-half payable in one year" is within the terms of the authorization;⁵³ and where the authority is to sell for \$15,000, about one-half cash, a sale for \$15,000 cash is within the terms of the authority.⁵⁴

Under a power to convey when the sale has been made by certain other persons, a conveyance can only effectively be made when those persons have made the sale.⁵⁵

§ 13. AUTHORITY TO MAKE REPRESENTATIONS AS TO VALUE, QUANTITY, LOCATION, BOUNDARIES OR TITLE.—An agent authorized merely to sell land has thereby, ordinarily, no implied power to bind his principal by representations concerning the value of the land;⁵⁶ the same thing is ordinarily true concerning representations as to the quantity, or quality of the land, though such representations, while not furnishing ground for action against the principal, might be sufficient to justify a rescission of the contract.⁵⁷ Representations as to location may be within the scope of such an agent's authority as being either necessary or usual,⁵⁸ and the same thing may be true respecting boundaries. In a case of the latter sort it was said: "In the sale or exchange of a tract of land, it is usual and necessary that the seller point out to the prospective buyer the boundaries of the tract—that he exhibit the thing he offers for sale to the view and inspection of the prospective buyer."⁵⁹

Representations respecting title, other than the usual covenants of warranty, heretofore referred to, or waivers of the principal's claim of title are not usually within the power of an agent merely authorized to sell.⁶⁰

⁵² *Jones v. Gibbs*, 18 Tex. Civ. App. 626, 46 S. W. 73. See similarly, *Anthony v. City of Providence*, 18 R. I. 699, 28 Atl. 766.

⁵³ *Deakin v. Underwood*, 37 Minn. 98, 5 Am. St. Rep. 827.

⁵⁴ *Witherell v. Murphy*, 147 Mass. 417, 18 N. E. 215.

⁵⁵ *Députron v. Young*, 134 U. S. 241, 10 Sup. Ct. 539.

⁵⁶ See, *Mayo v. Wahlgreen*, 9 Colo. App. 506, 50 Pac. 40; *Sanford v. Handy*, 23 Wend. (N. Y.) 260; *Lake v. Tyree*, 90 Va. 719, 19 S. E. 787 (that lots were "good building lots and valuable.")

⁵⁷ *Nat. Iron Armor Co. v. Bruner*, 19 N. J. Eq. 331; *Bennett v. Judson*, 21 N. Y. 238; *McKinnon v. Vollmar*, 75 Wis. 82, 43 N. W. 800. An agent authorized to sell has no authority to make representations as to a foundation wall. *Samson v. Beale*, 27 Wash. 557, 68 Pac. 180. No rescission if there was no agency: *Reeves v. McCracken*, — Tex. —, 128 S. W. 895.

⁵⁸ See, *Sanford v. Handy*, *supra*; *McKinnon v. Vollmar*, *supra*; *Porter v. Beattie*, 88 Wis. 22, 59 N. W. 499.

⁵⁹ *Green v. Worman*, 83 Mo. App. 568.

⁶⁰ *Tondro v. Cushman*, 5 Wis. 279; *Iowa R. R. Land Co. v. Fehring*, 126 Iowa 1, 101 N. W. 120.

So an agent authorized to sell has no authority to promise that the buyer shall

§ 14. AUTHORITY TO MAKE CONTRACT OF SALE JUSTIFIES CONTRACT IN USUAL FORM.—An authority to make a binding contract for the sale of land will, where there is nothing to indicate a contrary intention, carry with it by implication the authority to make the contract in the usual form and to include within it all usual and reasonable terms and provisions to accomplish the desired end. Thus the common provisions in well drawn contracts of this nature respecting remedies, time and place of performance, the effect of failure to perform, and the like, would doubtless be deemed authorized under this rule.⁶¹

§ 15. AUTHORITY TO SELL AND DISPOSE OF LAND IMPLIES RIGHT TO CONVEY.—Unless there be something in the instrument or in the circumstances surrounding its execution by which its scope is limited, as to the mere finding of a purchaser or the negotiation of a contract of sale, a general power to sell real estate if executed with the necessary formalities, carries with it the power to execute all the instruments necessary to complete the sale and carry it into effect.⁶² Said Chief Justice SHAW, "where the term 'sale' is used in its ordinary sense, and the general tenor and effect of the instrument is to confer on the attorney a power to dispose of real estate, the authority to execute the proper instruments required by law to carry such sale into effect is necessarily incident."⁶³

It is, of course, true in many cases, that an oral or written authority may be sufficient to justify a written contract to sell, although it

have a privilege to pass over adjoining land, owned by his principal, or that such land will not be fenced. *Noftsgier v. Barkdoll*, 148 Ind. 531, 47 N. E. 960.

But where the vendor refers the vendee to his local agent as one acquainted with land and equipped to explain its qualities and the agent in so doing misrepresents, it was held a ground for rescission. *A sale of coal lands. Mather v. Barnes*, 146 Fed. 1000.

⁶¹ See *Kilpatrick v. Wiley*, 107 Mo. 123, 95 S. W. 213. But in *Funk v. Church & Fitzgerald*, 132 Iowa 1, 109 N. W. 286, an agent authorized to sell, made an agreement to reimburse the purchaser if he lost a half of the land and it was held that the power to make such a contract was not to be implied.

⁶² *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; *Hemstreet v. Burdick*, 90 Ill. 444; *People v. Boring*, 8 Cal. 406; *Fogarty v. Sawyer*, 17 Cal. 589; *Marr v. Given*, 23 Me. 55, 39 Am. Dec. 600; *Alexander v. Walter*, 8 Gill (Md.) 239, 50 Am. Dec. 688; *Farnham v. Thompson*, 34 Minn. 330, 26 N. W. 9; *Delano v. Jacoby*, 96 Cal. 275, 31 Pac. 290. Of these cases, 8 Cal. 406, and 8 Gill 239 were official sales; 17 Cal. 589, was a sale under a power conferred by mortgage; the others were sales under formal powers of attorney, all apparently, under seal.

⁶³ In *Valentine v. Piper*, *supra*.

A person entrusted with a deed for the purpose of getting the grantor's signatures and then delivering it is clothed with at least apparent authority "to close the deal" on their part: *Bretz v. Connor*, 140 Wis. 269, 122 N. W. 717.

Secret instructions as to the conditions upon which a deed is to be delivered do not bind purchaser who has no notice of them; *Thornton v. Pinckard*, 157 Ala. 206, 47 So. 289.

would not be sufficient in form, as for example because of the lack of a seal, to authorize the execution of a deed.

§ 16. TO INSERT USUAL COVENANTS OF WARRANTY.—Although the decisions are not entirely harmonious, the better rule seems to be that a general power to sell and convey land carries with it authority to insert in the conveyance the ordinary covenants of general warranty where such sales are usually made with such covenants,⁶⁴ but not to make any unusual or special warranty, as of the quantity or quality of the land sold.⁶⁵ *A fortiori* may the agent warrant where he is expressly authorized to sell on such terms as he shall deem most eligible.⁶⁶

The fact that the agent inserts an unauthorized warranty will not ordinarily prevent the deed from having effect as a conveyance.⁶⁷

§ 17. AUTHORITY TO SELL DOES NOT JUSTIFY A MORTGAGE.—A power to sell, however, conveys no implied authority to mortgage.⁶⁸ Said Judge COOLEY, "The principal determines for himself what authority he will confer upon his agent, and there can be no implication from his authorizing a sale of his lands that he intends that his agent may at discretion charge him with the responsibilities and duties of a mortgagor."⁶⁹

§ 18. AUTHORITY TO RECEIVE PAYMENT.—The receipt of so much of the purchase money as is to be paid down, is within the general scope of an authority to sell and convey,⁷⁰ or to make a binding contract to sell upon terms including a payment at the time of the execution of the contract, but is held not to be within the power of

⁶⁴ Vanada v. Hopkins, 1 J. J. Marsh. (Ky.) 285, 19 Am. Dec. 92; Peters v. Farnsworth, 15 Vt. 155, 40 Am. Dec. 671; Le Roy v. Beard, 8 How. (U. S.) 451; Backman v. Charlestown, 42 N. H. 125; Farnham v. Thompson, 34 Minn. 330; Dimmick v. Sprinkel, 59 Wash. 329, 109 Pac. 1018; McLaughlin v. Wheeler, 1 S. D. 497, 47 N. W. 816; Schultz v. Griffin, 121 N. Y. 294, 24 N. E. 480, 18 Am. St. Rep. 825. Same rule applies to an authority to mortgage; Richmond v. Voorhees, 10 Wash. 316, 38 Pac. 1014. See also Bronson v. Coffin, 118 Mass. 156; Cf. Yazel v. Palmer, 88 Ill. 597. Contra: Stengel v. Sergeant, 74 N. J. Eq. 20, 68 Atl. 1106.

⁶⁵ National Iron Armor Co. v. Bruner, 19 N. J. Eq. 331.

⁶⁶ Le Roy v. Beard, *supra*.

⁶⁷ Kane v. Sholars, 41 Tex. Civ. App. 154, 90 S. W. 937.

⁶⁸ Jeffrey v. Hursh, 49 Mich. 31; Wood v. Goodridge, 6 Cush. (Mass.) 117, 52 Am. Dec. 771; Albany Fire Ins. Co. v. Bay, 4 N. Y. 9; Ferry v. Laible, 31 N. J. Eq. 566; Kinney v. Mathews, 69 Mo. 520; Patapsco, etc. Co. v. Morrison, 2 Woods (U. S. C. C.) 395; Devaynes v. Robinson, 24 Beav. 86; Morris v. Watson, 15 Minn. 212; Minnesota Stoneware Co. v. McCrossen, 110 Wis. 316, 85 N. W. 1019; Campbell v. Foster Home Association, 163 Pa. St. 609, 30 Atl. 222, 26 L. R. A. 117; Salem Nat. Bank v. White, 159 Ill. 136, 42 N. E. 312; Morris v. Ewing, 8 N. Dak. 99, 76 N. W. 1047; First Nat. Bank v. Hicks, 24 Tex. Civ. App. 269, 59 S. W. 842.

⁶⁹ In Jeffrey v. Hursh, *supra*.

⁷⁰ Peck v. Harriott, 6 Serg. & R. (Penn.) 146, 9 Am. Dec. 415; Carson v. Smith, 5 Minn. 78, 77 Am. Dec. 539; Mann v. Robinson, 19 W. Va. 49, 42 Am. Rep. 771; Alexander v. Jones, 64 Iowa, 207; Yerbey v. Grigsby, 9 Leigh (Va.) 387; Johnson v. McGruder, 15 Mo. 365; Goodale v. Wheeler, 11 N. H. 424.

an agent authorized merely by parol to contract for the sale.⁷¹ Mere authority to receive the immediate payment will not, however, warrant the receipt of subsequent payments.⁷² But an agent authorized to contract for the sale with the price to be paid in installments, and upon payment of the installments to execute the conveyance, has implied power to receive the installments.⁷³

When authorized to receive payment he must, like other agents similarly empowered, accept cash only or its equivalent, and he has no implied power to receive in payment notes, checks, or other similar tokens,⁷⁴ and *a fortiori* not notes given by himself for which the principal is not responsible.⁷⁵ Authority to receive such payments as are to be made as incidents of the sale does not justify the receipt of payments before any sale is entered into, and, obviously, does not justify the receipt of payments upon a contract which the agent had no authority to make.⁷⁶

§ 19. CONVEYANCE MUST BE FOR CONSIDERATION MOVING TO PRINCIPAL.—An agent authorized to sell and convey land will, unless the contrary appears, be deemed authorized to convey it only upon a sale, that is, upon a transfer for a consideration, and for a consideration which moves to the principal.⁷⁷ The land presumptively repre-

⁷¹ Smith v. Browne, 132 N. C. 365, 43 S. E. 915; Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540. See also Mann v. Robinson, *supra*; Stewart v. Wood, 63 Mo. 252.

Where one of three tenants in common was given parol authority to sell land and in the presence of the other two, the deeds were made out; and one of the parties delivered them to the purchaser in the presence of the one acting as agent and in the absence of the other, and the purchaser paid him his share of the money and paid to the agent the remainder, the agent being expressly directed not to receive it, it was held that the third tenant in common could recover her share of the price of the purchaser, because an authority to an agent to make a contract of sale, does not necessarily give an authority to receive payment; Shaw v. Williams, 100 N. C. 272, 6 S. E. 196. *A fortiori*; a broker who has mere authority to bring the parties together has no authority to receive payment; Halsell v. Renfrow, 14 Okl. 674, 78 Pac. 118.

⁷² Mann's Ex'r's v. Robinson, 19 W. Va. 40, 42 Am. Rep. 771. See Johnson v. Craig, 21 Ark. 533. Of course, the agent's authority over the matter of the sale of his principal's land may be so general as to give him power to receive payments at any time, or waive defaults in paying at the time fixed: McDonald v. Kingsbury, — Cal. App. —, 116 Pac. 380.

⁷³ Peck v. Harriott, *supra*; Carson v. Smith, *supra*.

⁷⁴ Ormsby v. Graham, 123 Iowa 202, 98 N. W. 724; Wilkin v. Voss, 120 Iowa 500, 94 N. W. 1123; Runyon v. Snell, 116 Ind. 164, 18 N. E. 522. But compare Galbraith v. Weber, 58 Wash. 132, 107 Pac. 1050, 28 L. R. A. (N. S.) 341.

⁷⁵ Runyon v. Snell, *supra*.

⁷⁶ Schaeffer v. Mutual Ben. L. Ins. Co., 38 Mont. 459, 100 Pac. 225; Brown v. Grady, 16 Wyo. 151, 92 Pac. 622 (receipt of earnest money upon an unauthorized contract does not bind principal); Jackson v. Badger, 35 Minn. 52, 26 N. W. 908 (same).

⁷⁷ Alcorn v. Buschke, 133 Cal. 655, 66 Pac. 15; Hunter v. Eastham, 95 Tex. 648, 69 S. W. 66. In Neill v. Kleiber, 51 Tex. Civ. App. 552, 112 S. W. 694, a power to sell and "to do with the said land as if the same were his own property," was held to authorize a sale on credit for the agent's own benefit.

sents value and if the agent conveys it, he must be expected to obtain something like a substantial equivalent.⁷⁸

§ 20. AUTHORITY TO GIVE CREDIT.—The power to sell land does not of itself imply an authority to sell on credit. The presumption is that the sale is to be for cash.⁷⁹ But where the agent is authorized to sell "on such terms as to him shall seem meet" he may grant a reasonable credit.⁸⁰ An authority to sell on credit, but not fixing the time to be given, implies a power to grant a reasonable time.⁸¹

§ 21. AUTHORITY TO SELL DOES NOT AUTHORIZE EXCHANGE OR BARTER.—Neither will a power to sell and convey land, imply an authority to barter or exchange it for other property, or to take the pay in merchandise. It is presumed, in the absence of anything showing a contrary intent, that the land is to be sold only, and sold for cash.⁸²

§ 22. ———. OR GIFT.—*A fortiori* has the agent no authority to

⁷⁸ Hunter v. Eastham, 95 Tex. 648, 69 S. W. 66; Lewis v. Lewis, 203 Pa. 194, 52 Atl. 203; Alcorn v. Buschke, 133 Cal. 655, 66 Pac. 15.

⁷⁹ Lumpkin v. Wilson, 5 Heisk. (Tenn.) 555; to the same effect, see Alcorn v. Gieseke, 158 Cal. 396, 111 Pac. 98; Lightfoot v. Horst, — Tex. —, 132 S. W. 761; Bowles v. Rice, 107 Va. 51, 57 S. E. 575; McKay v. McKinnon, — Tex. Civ. App. —, 122 S. W. 440; Edwards v. Davidson, (Tex. Civ. App.) 79 S. W. 48; Staten v. Hammer, 121 Iowa, 499, 96 N. W. 964; Dyer v. Duffy, 39 W. Va. 148, 19 S. E. 540; and, as a matter of course, where the power of attorney itself authorizes only a sale for cash, a sale on credit may be treated as void by the principal; Whitley v. James, 121 Ga. 521, 49 S. E. 600.

The power will be strictly construed. A power to sell for cash at any time within 30 days, will not justify giving a credit for not more than 30 days; Bowles v. Rice, *supra*.

⁸⁰ Carson v. Smith, 5 Minn. 78, 77 Am. Dec. 539.

In Morton v. Morris, 27 Tex. Civ. App. 262, 66 S. W. 94, the agent was given authority to sell on such terms as "to him shall seem meet." He sold the land and took as part of the consideration a non-negotiable note not due until one year after the removal of an attachment lien which the purchaser was interested in and of which the owner had no notice. The court said: "Were it not for the fact that it [the power], empowers the agent" to sell on such terms as to him shall seem meet, "there could be no implication that authority was to sell on credit, but the presumption would be that the sale should be for cash. As it is he was authorized to sell on reasonable credit. * * * Is twelve months after * * * the ending of a lawsuit a reasonable credit to be given by an agent for the payment of the purchase money due for the sale of his principal's property? As a matter of law, we think not."

⁸¹ Brown v. Central Land Co., 42 Cal. 257.

⁸² Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 611; Trudo v. Anderson, 10 Mich. 357, 81 Am. Dec. 795; Mann v. Robinson, 19 W. Va. 49, 42 Am. Rep. 771; Lumpkin v. Wilson, 5 Heisk. (Tenn.) 555; Rhine v. Blake, 59 Tex. 240; Morrill v. Cone, 22 How. (U. S.) 75; Hampton v. Moorhead, 62 Iowa, 91; Dupont v. Wertheman, 10 Cal. 354; Mott v. Smith, 16 Cal. 533; Paul v. Grimm, 165 Pa. 139, 30 Atl. 721, 183 Pa. 326, 38 Atl. 1017; Mora v. Murphy, 83 Cal. 12, 23 Pac. 63; Chapman v. Hughes, 134 Cal. 641, 58 Pac. 298, 60 Pac. 974; Edwards v. Davidson, (Tex. Civ. App.), 79 S. W. 48; Kempner v. Rosenthal, 81 Tex. 12, 16 S. W. 639.

give the land away or to convey it without any consideration moving to the principal.⁸³

§ 23. AUTHORITY TO SELL DOES NOT AUTHORIZE OPTION TO BUY.—An agent with authority to sell has, thereby, no implied authority to give an option to buy. Such option, will, during its term, prevent a sale to any other person, and a sale to the one holding the option will not be insured.⁸⁴

§ 24. DOES NOT AUTHORIZE WASTE OR SALE OF TIMBER SEPARATE FROM LAND.—An agent or attorney who has power only to bargain and sell land subject to confirmation, has no authority to license anyone to enter thereon and commit waste or cut timber, nor has he power to sell the timber distinct from the land.⁸⁵

§ 25. DOES NOT AUTHORIZE CHANGING BOUNDARIES OF LAND.—Nor has an agent authorized to sell or rent real estate any implied power to agree with an adjoining land owner upon a change of the boundaries of the principal's land.⁸⁶

§ 26. DOES NOT AUTHORIZE PARTITION.—Authority to sell and convey land does not authorize a partition of the land in which the principal has an interest as tenant in common.⁸⁷

§ 27. DOES NOT AUTHORIZE DEDICATION TO PUBLIC USE.—Mere authority to sell and convey land does not imply power to dedicate any part of it to the public use;⁸⁸ but a power "to sell, convey, plat and subdivide in such manner as to make the property marketable and to acknowledge and record such plat" implies a power to dedicate such portion as may be necessary to the public use.⁸⁹ So a power to lay out land in order to dispose of it, implies authority to dedicate the necessary highways,⁹⁰ and authority to purchase a town site and lay it out, implies power to dedicate proper and appropriate streets.⁹¹

⁸³ In *Randall v. Duff*, 79 Cal. 115, 19 Pac. 532, it was conceded that where the authority was to sell, a conveyance by way of gift passed no title but that a bona fide mortgagee of the donee had a valid lien upon the land to the extent of his money advanced; and in *Van Zandt v. Furlong*, 18 N. Y. Supp. 54 (63 Hun 630), it was held that although the attorney with mere authority to sell could not make a valid transfer without valuable consideration, yet a subsequent purchaser from the transferee could not recover back his consideration by offering to prove that the prior conveyance had been made by an agent with mere authority to sell and had, in fact, been made without consideration.

⁸⁴ *Field v. Small*, 17 Colo. 386, 30 Pac. 1034; *Tibbs v. Zirkle*, 55 W. Va. 49, 46 S. E. 701. See also *Dyer v. Duffy*, 39 W. Va. 148, 19 S. E. 540.

⁸⁵ *Hubbard v. Elmer*, 7 Wend. (N. Y.) 446, 22 Am. Dec. 590; *St. Louis S. W. Ry. Co. v. Texas v. Bramlette* (Tex. Civ. App.), 35 S. W. 25.

⁸⁶ *Fore v. Campbell*, 82 Va. 808, 1 S. E. 180.

⁸⁷ *Borel v. Rollins*, 30 Cal. 408; *Wirt v. McEnery*, 21 Fed. 233.

⁸⁸ *Wirt v. McEnery*, 21 Fed. 233; *Gosselin v. Chicago*, 103 Ill. 623; *Anderson v. Bigelow*, 16 Wash. 198, 47 Pac. 426.

⁸⁹ *Wirt v. McEnery*, *supra*.

⁹⁰ *State v. Atherton*, 16 N. H. 203.

⁹¹ *Barteau v. West*, 23 Wis. 416.

§ 28. AUTHORITY TO SELL DOES NOT AUTHORIZE CONVEYANCE TO PAY PRINCIPAL'S DEBTS, OR ASSIGNMENT FOR CREDITORS.—The power to sell land does not authorize a conveyance in settlement of a pre-existing claim against the principal,⁹² nor an assignment for the benefit of creditors.⁹³ But where the authority was to sell the land and pay the proceeds to the principal's creditor, it was held that a conveyance directly to the creditor was within the terms of the power.⁹⁴

§ 29. NOR CONVEYANCE IN PAYMENT OF AGENT'S DEBTS.—An agent authorized to sell and convey real estate can do so only for and in behalf of his principal. He may not convey it in trust for the payment of his own debts;⁹⁵ nor can he make the conveyance directly, for the payment of his own debt, or the joint debt of himself and one of his principals.⁹⁶

§ 30. NOR CONVEYANCE IN TRUST FOR SUPPORT OF PRINCIPAL'S CHILD.—A wife was authorized to sell or mortgage land as agent of her husband. It was held that a conveyance in trust for the support of their infant daughter was not within the authority given by the power.⁹⁷ Neither can she convey it in satisfaction of advances made to her by their son.⁹⁸

§ 31. NO IMPLIED POWER TO REVOKE OR ALTER CONTRACT.—An agent authorized to make a contract for the sale of land exhausts his power with the completion of that contract; and has thereafter no implied power to revoke or rescind it, or to release the purchaser from its obligations.⁹⁹ So an agent who has made a contract to sell

⁹² *Skirvin v. O'Brien*, 43 Tex. Civ. App. 1, 95 S. W. 696.

⁹³ *Frost v. Erath Cattle Co.*, 81 Tex. 505, 17 S. W. 52; *Gouldy v. Metcalf*, 75 Tex. 455, 12 S. W. 830.

Neither does it authorize a conveyance in satisfaction of a debt which has been barred by the statute of limitations. *Smith v. Powell*, 5 Tex. Civ. App. 373, 23 S. W. 1109. Nor does an authority to one of several co-heirs to sell a piece of real estate, authorize a conveyance of it in satisfaction of a judgment against such heir and his mother; *Folts v. Ferguson*, (Tex. Civ. App.), 24 S. W. 657. But where the agent had a partnership interest in the land, and had the complete management and control of it, it was held that a conveyance by him in consideration of a cancellation of the partnership notes was authorized. *Kempner v. Rosenthal*, 81 Tex. 12, 16 S. W. 639. And where the authority was "to make a sale or other disposition of the" property, and "to execute all deeds," etc., it was held that a conveyance to an attorney for legal services in locating and establishing a town site on the land, was within the terms of the power. *Jones v. Gibbs*, 18 Tex. Civ. App. 626, 46 S. W. 73.

⁹⁴ *Bertschy v. Bank of Sheboygan*, 89 Wis. 473, 61 N. W. 1115.

⁹⁵ *Frink v. Roe*, 70 Cal. 296, 11 Pac. 820; *Runyon v. Snell*, 116 Ind. 164.

⁹⁶ *Hunter v. Easthan*, 95 Tex. 648, 69 S. W. 66. Same case came up again (Tex. Civ. App.), 81 S. W. 336.

⁹⁷ *Coulter v. Portland Trust Co.*, 20 Or. 469, 26 Pac. 565. Same case, 23 Or. 131, 31 Pac. 280.

⁹⁸ *Lewis v. Lewis*, 203 Pa. 194, 52 Atl. 203.

⁹⁹ *Luke v. Grigg*, (Dak.), 30 N. W. 170; *West End Hotel & Land Co. v. Crawford*, 120 N. C. 347, 27 S. E. 31.

and received a part payment thereon, has no implied power to return the money because he is erroneously led to believe that the principal's title was imperfect.¹⁰⁰

Such an agent will, moreover, have ordinarily no power to change or alter the completed contract or to substitute another in its place,¹⁰¹ though his authority over the subject matter may be sufficiently comprehensive to justify it.¹⁰²

§ 32. NO IMPLIED POWER TO DISCHARGE MORTGAGE.—An agent authorized merely to sell land has therefrom no implied power to release or discharge mortgages belonging to his principal;¹⁰³ but an agent having general authority to deal in land, may bind his principal by the assumption of a mortgage as part of the purchase price.¹⁰⁴

§ 33. NO IMPLIED POWER TO INVEST PROCEEDS.—A power of attorney authorizing the agent to take possession of and sell all the property of his principal, and collect his debts, does not authorize the agent to re-invest the funds of his principal or to engage therewith in any schemes of speculation, however tempting.¹⁰⁵

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¹⁰⁰ *Montgomery v. Pacific Coast Land Bureau*, 94 Cal. 284, 29 Pac. 640.

¹⁰¹ In *Hill v. Bess* (Tex. Civ. App.), 40 S. W. 202, it was held that a mere authority to sell lands and collect payments does not authorize the agent, after deed has been given, and purchase money notes have been sent to the vendor, to take new notes in substitution (which the agent wrongfully retained and appropriated), though the agent erroneously supposed the first notes had miscarried in the mails.

¹⁰² Thus in *Francis v. Litchfield*, 82 Iowa 726, 47 N. W. 998, it was held that where one had general authority to sell the lands of a non-resident principal, and collect the payments, he had implied authority to make a contract with a purchaser whereby he was to take a second mortgage on the land instead of a first mortgage, in consideration that the purchaser would make a part payment out of the proceeds of the first mortgage and give some additional security. There was also evidence of ratification.

¹⁰³ *Barger v. Miller*, 4 Wash. (U. S. C. C.) 280.

¹⁰⁴ *Schley v. Fryer*, 100 N. Y. 71.

¹⁰⁵ *Stoddart v. United States*, 4 Ct. Cl. 511. See *Porges v. U. S. Mortgage & Trust Co.*, 135 App. Div. 484, 120 N. Y. Supp. 487, where a power to sell was accompanied by express power to use proceeds in effecting a redemption of mortgaged land; it was held that the agent could convert proceeds of a sale in the form of a check payable to his principal into cash and deposit the same in his individual banking account.